



A Lidl more joy this time – TCC accepts food retailer's claims in part

In *Lidl Great Britain Limited v Closed Circuit Cooling Limited t/a 3CL* [2023], the TCC was asked to consider whether the Construction Act operated to prohibit any adjudication while a notified sum remained unpaid, even where the subject matter of the adjudication has no relation to that notified sum.

The Court held that it did not, and as a result accepted the Employer's further claims in part.

Background

Lidl Great Britain Limited ("**Lidl**") and Closed Circuit Cooling Limited t/a 3CL ("**3CL**") entered into a framework agreement which enabled the parties to enter into a series of individual work orders for refrigeration and air-conditioning works across Lidl's premises.

As discussed in our bulletin at the time ([Lidl joy: Court rejects food retailer's Part 8 Claims - Hawkswell Kilvington](#)), Lidl had been unsuccessful in earlier proceedings concerning the decision in an initial adjudication between the parties.

By way of reminder, in that adjudication the contractor, 3CL, had referred a dispute over its entitlement to payment under its application for payment 19 ("**AfP19**"). In response, Lidl had sought to rely on a purported payment notice ("**Pay-7**"). By a decision dated 1 June 2023, the first adjudicator rejected all of Lidl's submissions. The adjudicator found that AfP19 was valid, Pay-7 was not a valid notice and that the final date for payment could not be conditional upon delivery of a VAT invoice. Payment was ordered together with interest, in 3CL's favour (the "**First Decision**").

Lidl failed to pay in accordance with the First Decision and went on to issue a Part 8 claim seeking declarations in respect of the underlying issues. In response, 3CL issued a Part 7 claim and a summary

judgment application seeking enforcement of the First Decision.

Having declined to grant the declarations sought by Lidl, and in the absence of any substantive defence to enforcement, the court gave judgment in favour of 3CL.

The present judgment concerns two subsequent adjudications between the parties.

In adjudication no.2, Lidl sought to recover the cost of rectifying alleged defects, to be paid as a debt or offset against sums otherwise owed to 3CL. By a decision dated 25 September 2023 the second adjudicator, Mr Hough, decided that Lidl could deduct the sum of £757,845.63 plus interest from any monies due or which may become due to 3CL within 7 days (the "**Second Decision**").

Lidl went on to commence a further (third) adjudication in relation to 3CL's entitlement to an extension of time. By a decision dated 3 October 2023 the adjudicator, Dr Mastrandrea, decided that 3CL had no entitlement to an extension of time (the "**Third Decision**").

Following 3CL's failure to pay in accordance with the Second Decision, Lidl brought a Part 7 claim to enforce that decision. In response, 3CL issued a Part 8 claim seeking a declaration that both the Second and Third Decisions were unenforceable. 3CL contended the adjudicator in each case had lacked jurisdiction because at time of commencing those adjudications, Lidl had not yet satisfied its immediate payment obligation under s.111 of the Housing Grants Construction and Regeneration Act 1996 (as amended) (the "**Act**") in respect of AfP19 (by the date of each decision Lidl had paid, but it had not done so at the date of the respective referrals).

The Grove Principle

The judge, His Honour Judge Stephen Davies, took as his starting point the decision in *S&T(UK) Ltd v Grove* [2018], to the effect that "*both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his*

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immediate payment obligation." ("The **Grove Principle**").

In the present case, the judge had to determine whether the Grove Principle was only applicable to true value adjudications where the dispute referred was limited to a valuation of the *same payment cycle* as the subject of the notified sum, or if it extended to *any* adjudication arising under the contract. To the extent the adjudications fell within the Grove Principle, properly determined, the adjudicators would lack jurisdiction because they had been commenced before payment of the notified sum had been made.

Held

The judge rejected the wide no adjudication prohibition contended for by 3CL and found there is no rationale for a construction of the Act which has the effect of prohibiting any adjudication whilst that notified sum remains unpaid, even where the subject matter of the adjudication has no relation to the notified sum.

The judge determined that a party's true value claims would be covered by the Grove principle insofar as they are matters which could have been the subject of a payless notice served in respect of the particular notified sum in question. If a payer has, at the time of the relevant payment cycle, a claim for defect related losses in respect of defects already in existence or a claim for delay related losses in respect of delay already suffered, but fails to serve a valid payless notice in respect of them, it cannot commence a true value adjudication in respect of such claims until it has paid the relevant notified sum. If, however, it subsequently has a claim in respect of defects or delay occurring after the pay less notice date in respect of the notified sum, then there can be no principled reason for prohibiting the payer from commencing an adjudication in respect of such matters.

Moreover, the judge identified that there is "*a fundamental difference between a prohibition against commencing an adjudication, where the penalty is that any decision would be made without jurisdiction and, hence, be unenforceable, and a prohibition against*

using any such claim as a defence to an adjudication enforcement claim."

Applying these principles to the facts of adjudications 2 and 3, the Judge was satisfied that 3CL had demonstrated that of the £757,845.63 awarded to Lidl in adjudication no.2, at least £260,899.61 was awarded in circumstances outside the Adjudicator's jurisdiction, because of duplication of those items with items in invalid Pay-7. Accordingly, Lidl's enforcement claim succeeded, but only to the tune of £494,946.02.

In relation to adjudication no.3, the Adjudicator had no jurisdiction to re-visit 3CL's extension of time for the period 18 June – 29 September 2022, as that was in substance seeking to undertake a true valuation of that issue which if successful would inevitably lead to a claim for liquidated damages in respect of that period. As such, this had been prohibited under the Grove principle.

In contrast, the adjudicator did have jurisdiction over the periods before and after that prohibited period, and to that extent 3CL's claim to relief was rejected.

Analysis

The case provides welcome clarification of the scope of the Grove principle and the circumstances in which payers can be confident of subsequent adjudication decisions being enforced.

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